STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

In the Matter of:

SHELBY TOWNSHIP,

Respondent/Appellant,

-and-

COMMAND OFFICERS ASSOCIATION OF MICHIGAN,

Charging Party/Appellee.

Docket No. 153074
COA Case No. 323491
MERC Case No. C12 D-067

AMICUS CURIAE BRIEF OF THE MICHIGAN MUNICIPAL LEAGUE

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE BASIS OF JURISDICTION

On August 18, 2014, the Michigan Employment Relations Commission (hereinafter "MERC") entered a Decision and Order which held that the Respondent/Appellant, Shelby Township (hereinafter "the Township"), failed to bargain over a mandatory subject of bargaining in connection with the Township's allocation of its employees' share of the costs of employee medical benefit plans under Public Act 152 of 2011, and that the Township applied an incorrect rate for health insurance costs to members of a bargaining unit represented by the Charging Party/Appellee, Command Officers Association of Michigan. On December 15, 2015, the Court of Appeals entered an Opinion and Order affirming MERC's Decision and Order in its entirety.

The Township filed an Application for Leave to Appeal the Court of Appeals Opinion and Order on February 23, 2016. Amici Curiae the Michigan Municipal League and the Public Corporation Law Section of the State Bar of Michigan submitted a Brief in Support of the Township's Application for Leave to Appeal on April 1, 2016. This Court granted leave to appeal on February 3, 2017. *Shelby Township v Command Officers Assn of Michigan*, No. 153074, 889 NW2d 703 (2017).

This Court has jurisdiction to hear an appeal from the Court of Appeals under MCR 7.303(B)(1) and MCL § 600.215(3).

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Does the language of the Publicly Funded Health Insurance Contribution Act, Public Act 152 of 2011, that a "public employer may allocate its payments for medical benefit plan costs among its employees and elected officials as it sees fit" and that the "public employer may allocate the employees' total share of annual costs of the medical benefit plans among the employees of the public employer as it sees fit" involve mandatory subjects of bargaining under the Public Employment Relations Act, Public Act 379 of 1965?

   Amici Curiae answer NO.
   Respondent/Appellant Shelby Township answers NO.
   Charging Party/Appellee, Command Officers Association of Michigan answers YES.
   The Michigan Employment Relations Commission answered YES.
   The Court of Appeals answered YES.

2. Did MERC have authority to interpret the Publicly Funded Health Insurance Contribution Act, Public Act 152 of 2011, to preclude a public employer's use of "bundled insurance rates" in calculating employees' shares of medical benefit plan costs in this case?

   Amici Curiae answer NO.
   Respondent/Appellant Shelby Township answers NO.
   Charging Party/Appellee, Command Officers Association of Michigan answers YES.
   The Michigan Employment Relations Commission answered YES.
   The Court of Appeals answered YES.

INTRODUCTION

This *Amicus Curiae* Brief is submitted by the Michigan Municipal League in support of Shelby Township's Appeal to this Court of a Decision of the Michigan Court of Appeals issued on December 15, 2015. (**JA 489a-492a**). This Brief results from the fact that the Decision of the Court of Appeals involves issues of significant public interest, is a case against a subdivision of the State, and concerns issues that involve legal principles of major significance to the State's jurisprudence, and because the Decision of the Court of Appeals is clearly erroneous and will cause material injustice.

Amicus Curiae Michigan Municipal League is a non-profit Michigan corporation whose purpose is the improvement of municipal government and administration through cooperative effort. Its membership is comprised of 521 Michigan local governments, of which 478 are also members of the Michigan Municipal League Legal Defense Fund (the "Legal Defense Fund"). The Michigan Municipal League operates the Legal Defense Fund through a Board of Directors. The purpose of the Legal Defense Fund is to represent the member local governments in litigation of statewide significance.

This Brief *Amicus Curiae* is authorized by the Legal Defense Fund's Board of Directors, whose membership includes the president and executive director of the Michigan Municipal League, and the officers and directors of the Michigan Association of Municipal Attorneys: Clyde J. Robinson, city attorney, Kalamazoo; John C. Schrier, city attorney, Muskegon; Lori Grigg Bluhm, city attorney, Troy; Eric D. Williams, city attorney, Big Rapids; James J. Murray, city attorney, Boyne City and Petoskey; Robert J. Jamo, city attorney, Menominee; Thomas R. Schultz, city attorney, Farmington and Novi; Lauren Trible-Laucht, city attorney, Traverse City;

Ebony L. Duff, city attorney, Oak Park; Steven D. Mann, city attorney, Milan; and William C. Mathewson, general counsel, Michigan Municipal League.

Because the Michigan Municipal League is an association representing various political subdivisions of the State, and this Brief is filed on their behalf, the Michigan Municipal League requests that this Court accept this amicus curiae Brief without a motion for leave. MCR 7.306(D)(2).

STATEMENT OF FACTS

This case revolves around Sections 3 and 4 of the Publicly Funded Health Insurance Contribution Act, MCL 15.563 and MCL 15.564. That statute, which is also known as Public Act 152 of 2011 (and will hereinafter be referred to as "PA 152"), was enacted in response to the Michigan Legislature's and Governor's desire for public employees to contribute toward the cost of the health insurance provided by their employers.

In enacting this statute, the Legislature provided public employers with three (3) choices: (a) the "hard-cap" option, under which employees pay all premium costs in excess of a hard-cap amount set by the State Department of Treasury, (b) the "80/20" option, under which the public employer pays 80% of the premium cost while its employees pay the remaining 20% of those costs, or (c) the "opt-out" option, under which the public employer exempts itself from the operation of PA 152.[1]

Section 3(1) of PA 152, MCL 15.563(1) addresses the hard-cap option, and provides as follows:

> Except as otherwise provided in this act, a public employer that offers or contributes to a medical benefit plan for its employees or elected public officials shall pay no more of the annual costs or illustrative rate and any payments for reimbursement of co-pays, deductibles, or payments into health savings accounts, flexible spending accounts, or similar accounts used for health care costs, than a total amount equal to $5,500.00 times the number of employees and elected public officials with single-person coverage, $11,000.00 times the number of employees and elected public officials with individual-and-spouse coverage or individual-plus-1-nonspouse-dependent coverage, plus $15,000.00 times the number of employees and elected public officials with family coverage, for a medical benefit plan coverage year beginning on or after January 1, 2012. ***A public employer may allocate its payments for medical benefit plan costs among its employees and elected public officials as it sees fit.*** By October 1 of each year after 2011, the state treasurer shall adjust the maximum payment permitted under this subsection for each coverage category for medical benefit

[1] Not every public employer may afford itself of the opt-out option. For example, Michigan public school districts do not have this option. MCL 15.562; MCL 15.568

> plan coverage years beginning the succeeding calendar year, based on the change in the medical care component of the United States consumer price index for the most recent 12-month period for which data are available from the United States department of labor, bureau of labor statistics. (emphasis added).

Section 4 of PA 152, MCL 15.564, addresses the 80/20 option, and provides:

> (1) By a majority vote of its governing body each year, prior to the beginning of the medical benefit plan coverage year, a public employer, excluding this state, may elect to comply with this section for a medical benefit plan coverage year instead of the requirements in section 3. The designated state official may elect to comply with this section instead of section 3 as to medical benefit plans for state employees and state officers.
>
> (2) For medical benefit plan coverage years beginning on or after January 1, 2012, a public employer shall pay not more than 80% of the total annual costs of all of the medical benefit plans it offers or contributes to for its employees and elected public officials. For purposes of this subsection, total annual costs includes the premium or illustrative rate of the medical benefit plan and all employer payments for reimbursement of co-pays, deductibles, and payments into health savings accounts, flexible spending accounts, or similar accounts used for health care but does not include beneficiary-paid copayments, coinsurance, deductibles, other out-of-pocket expenses, other service-related fees that are assessed to the coverage beneficiary, or beneficiary payments into health savings accounts, flexible spending accounts, or similar accounts used for health care. For purposes of this section, each elected public official who participates in a medical benefit plan offered by a public employer shall be required to pay 20% or more of the total annual costs of that plan. ***The public employer may allocate the employees' share of total annual costs of the medical benefit plans among the employees of the public employer as it sees fit.*** (emphasis added).

As the highlighted portion of these statutory provisions indicate, the plain language of the statute left it to the public employer to allocate its employees' share of these costs among those employees "as it sees fit."

In the instant case, the Respondent/Appellant, the Township of Shelby (hereinafter "the Township") chose the 80/20 option, and in reliance upon the clear statutory language, allocated the 20% of the costs among its employees. (**JA 30a; JA 47a, Tr., pp. 59:13-20; JA 48a, 62:17-19; JA 52a, 78:10-16**). The Charging Party/Appellee, the Command Officers Association of Michigan (hereinafter "the Union"), who at all times relevant hereto, represented a group of the

Township's employees, objected to the cost allocation imposed by the Township. (**JA 76a; JA 9a-10a**). Essentially, the Union contended that such cost allocation involved a "mandatory subject of bargaining" under the Michigan Public Employment Relations Act (PERA), and that, as such, the Township could not unilaterally impose such cost sharing. (**JA 2a-8a**).

The Union filed an unfair labor practice charge with the Michigan Employment Relations Commission (MERC)(***Id***.), which, on August 18, 2014, held as follows:

> In summary, the choice of cost sharing options under Act 152 is a permissive subject of bargaining. A public employer may, but is not required to bargain over whether it will apply the hard caps under Section 3, the eighty percent employer share under Section 4, or exempt itself under Section 8. Where the employer chooses to implement the eighty percent share under Section 4 of Act 152, the employer has a duty to bargain over the amount of the employees' share of health care costs subject to the parameters of Act 152. (**JA 315a-316a**).

The Township appealed MERC's decision to the Michigan Court of Appeals. (**JA 319a-450a**). On December 15, 2015, the Court of Appeals issued a perfunctory Opinion in which it affirmed MERC's decision.[2] (**JA 488a-492a**).

[2] As is clearly established by the Township's Application for Leave to Appeal in this case, the Court of Appeals based its Decision upon *dicta* from its Opinion in *Decatur Public Schools, supra*. The lower Court clearly committed reversible error when, in the absence of any new analysis, it relied solely upon *dicta* in deciding this case.

ARGUMENT

I. THE LANGUAGE OF PA 152 THAT A "PUBLIC EMPLOYER MAY ALLOCATE ITS PAYMENTS FOR MEDICAL BENEFIT PLAN COSTS AMONG ITS EMPLOYEES AND ELECTED OFFICIALS AS IT SEES FIT" AND THAT THE "PUBLIC EMPLOYER MAY ALLOCATE THE EMPLOYEES' TOTAL SHARE OF ANNUAL COSTS OF THE MEDICAL BENEFIT PLANS AMONG THE EMPLOYEES OF THE PUBLIC EMPLOYER AS IT SEES FIT" DO NOT INVOLVE MANDATORY SUBJECTS OF BARGAINING UNDER PERA.

It is, of course, an axiomatic principle of labor law that all subjects that could be negotiated between a public employer and a labor organization under PERA can be categorized into three (3) areas:

> The duty to bargain in good faith under § 15 PERA and 18(d) NLRA extends to those subjects found within the scope of the phrase "* * * wages, hours, and other terms and conditions of employment." In the prevailing language used to interpret the NLRA and adopted by MERC in interpreting §15 PERA in this case, the subjects included within that phrase are referred to as "mandatory subjects" of bargaining. Once a specific subject has been classified as a mandatory subject of bargaining, the parties are required to bargain concerning the subject if it has been proposed by either party, and neither party may take unilateral action on the subject absent an impasse in the negotiations.
>
> * * *
>
> The remaining matters not classified as mandatory subjects of bargaining are referred to as either "permissive" or "illegal" subjects of bargaining. A permissive subject of bargaining falls outside of the phrase "wages, hours, and other terms and conditions of employment." An example of a permissive subject would be a desire by one party to include a union label on all products manufactured by the employer. *Kit Manufacturing Co.*, 150 N.L.R.B. 662; 58 LRRM 1140 (1964), enforced 365 F.2d 829 (CA 9, 1966). Since the impact of including the union's label on a product was found by the NLRB to be at best "remote and speculative" to wages, hours, and other terms and conditions of employment, the NLRB would not require the parties to bargain on the subject. The parties, however, may bargain by mutual agreement on a permissive subject, but neither side may insist on bargaining to a point of impasse. *National Labor Relations Board v. Wooster Division of Borg-Warner Corp., supra*.
>
> An "illegal" subject of bargaining is a provision, such as a closed shop, that is unlawful under the collective bargaining statute or other applicable statute. "The

> parties are not explicitly forbidden from discussing matters which are illegal subjects of bargaining, but a contract provision embodying an illegal subject is, *** unenforceable." *Edwards*, *supra*, 909.

Detroit Police Officers Association v City of Detroit, 391 Mich 44, 214 NW2d 803, 808 (1974).

An analysis of the present case begins with an examination of MERC's and the Michigan Court of Appeals' decisions in a case involving the Decatur Public Schools. In *Decatur Public Schools*, 27 MPER 41 (2014), MERC was squarely faced with the issue of whether a public employer's decision to adopt the hard-cap, 80/20, or opt-out option under PA 152 represented a mandatory subject of bargaining. In holding that such a choice is <u>not</u> a mandatory subject of bargaining, MERC held:

> By basing the public employer's share of health care costs on the total amount to be paid for health care costs for all employees and public officials, PA 152 makes it clear that the public employer's costs are not determined by the amount the public employer pays for particular bargaining units or other groups of employees, but for all employees and public officials as a single group. Therefore, it is evident that the public employer must choose with respect to all of its employees and public officials whether it will use the hard caps under § 3 or the 80% employer share under § 4. Moreover, the fact that § 4 requires a majority vote of the public employer's governing body indicates that the choice between the hard caps and the 80% employer share is a policy choice to be made by the employer. Thus, while not expressly making this issue a prohibited subject of bargaining, it is clear the Legislature intended that the choice between the hard caps and the 80% employer share be left to the public employer.
>
> Accordingly, we agree with Respondent's argument that the ALJ erred by finding that the choice between the hard caps and 80% employer share is a mandatory subject of bargaining. Public employers may bargain with the labor organizations representing their employees over the choice between the hard caps and the 80% employer share, but are not required to do so.

MERC's decision in *Decatur Public Schools* was appealed to the Michigan Court of Appeals, which, on March 17, 2015 affirmed MERC's decision:

> We find that PA 152 and PERA do not conflict and that there is no duty to bargain over the employer's choice between the hard-cap limits and the 80/20 plan. Initially, the plain language of PA 152 does not give rise to an obligation to bargain with regard to this choice. Notably, MCL 15.563(1) states that a public

> employer "*shall pay no more of the annual costs*" than "a total amount equal to" the hard caps set forth in the statute (emphasis added). The word "shall" is a mandatory directive, indicating that the hard-caps option is the default position. See *Smitter v Thornapple Twp*, 494 Mich 121, 136; 833 NW2d 875 (2013) ("The Legislature's use of the word 'shall' generally indicates a mandatory directive, not a discretionary act."). As an alternative to the hard-caps requirement, the public employer may, "[b]y majority vote of its governing body" elect to comply with the 80/20 plan. MCL 15.564(1). Nothing in this language gives rise to the idea that there is a duty to bargain with regard to the choice between hard caps and the 80/20 plan. Rather, the choice is left to the "governing body" of the public employer to decide, by majority vote, if it will depart from the default position of the hard caps. As noted by MERC, this interpretation is buttressed by examination of the repeated references in PA 152 to "total annual costs" of health care contributions and the fact that the limits imposed by the act apply to the total annual costs of contributions for all the employer's employees and all bargaining groups. The act does not speak of total annual costs for each type of plan chosen by each individual bargaining group; rather, the act speaks only of the total annual costs of contributions for the public employer's "employees." See MCL 15.563 and MCL 15.564. This supports the interpretation that an employer is to choose one type of plan for all of its employees, not that the employer is to bargain over the choice of plans with each of its labor groups. In other words, the choice of contribution limits for all employees is left solely to the public employer.

Van Buren County Education Association, et al v Decatur Public Schools, 309 Mich App 630, 643-44, 872 NW2d 710, 718 (2015).

Thus, when the instant case was presented to the Court of Appeals, both MERC and that Court had already ruled that a public employer's choice between the hard-cap, the 80/20, or the opt-out options was not a mandatory subject of bargaining based upon, what the Court of Appeals characterized as "the plain language of PA 152." Yet, only eight (8) months later, in the present case, that same Court, despite "the plain language of PA 152," nonetheless concluded that a public employer's statutory right under PA 152 to allocate its employees' share of health insurance costs among those employees "as it sees fit" is a mandatory subject of bargaining. (**JA 488a-492a**).

Again, as discussed above and under well-established principles of labor law, this issue must be a mandatory, permissive, or illegal subject of bargaining. In the context of the present

case, it makes little difference as to whether a public employer's statutory right under PA 152 to allocate its employees' share of health insurance costs among those employees "as it sees fit" is a permissive or illegal subject of bargaining. Rather, what is it at issue here is MERC's and the Court of Appeals' erroneous conclusion that this issue raises a mandatory subject of bargaining. The conclusion that a mandatory subject of bargaining is present here represents reversible error for at least six (6) reasons.

First, it is simply impossible to read Sections 3 and 4 of PA 152 to create a dichotomy under which the public employer's choice between the hard-cap and 80/20 options is not a mandatory subject of bargaining (as held by both MERC and the Court of Appeals in *Decatur Public Schools, supra*), but that the allocation of employee costs among its employees is such a mandatory subject. Nowhere does PA 152 state that a public employer is to choose between the hard-cap, 80/20, or opt-out options "as it sees fit." Yet, both MERC and the Court of Appeals had no problem in concluding that such a choice was not a mandatory subject of bargaining. (**JA 303a-318a; JA 488a-492a**). Against that backdrop, how does one then examine the statute's express provision that employee costs are to be allocated as their public employer "sees fit," and come to the conclusion that such cost allocations do represent mandatory subjects of bargaining? Stated another way, the phrase "as it sees fit" is actually clearer than the language of PA 152 upon which MERC and the Court of Appeals relied in *Decatur Public Schools, supra,* to conclude that the choice between the hard cap, the 80/20, or the opt-out is not a mandatory subject.

Second, even disregarding the dichotomy between the Court of Appeal's Decisions in *Decatur Public Schools, supra,* and the present case, the Legislature specifically left the decision regarding the allocation of employee costs among the employees to be made by the public

employer "as it sees fit." It is difficult to conceive of language that could have been used by the Legislature to make clearer its intent that this issue was to be removed from the realm of mandatory bargaining subjects.

In the Township's Brief on Appeal, counsel for the Township has assembled an impressive litany of Michigan case law that stands for the proposition that the term "as it sees fit" means what it says. It should come as no surprise that case law from other jurisdictions is in accord. For example, *Stahmer v State*, 192 Neb 63, 67, 218 NW2d 893, 896 (1974), *overruled on other grounds by MAPCO Ammonia Pipeline, Inc v State Bd of Equalization & Assessment*, 238 Neb 565, 471 NW2d 734 (1991) involved the interpretation of an amendment to the Nebraska Constitution which provided that the legislature could "classify personal property in such manner as it sees fit. . . ." Neb Const art VIII, § 1. The Nebraska Supreme Court held that:

> The 1970 amendment of Article VIII, section 2, to provide "The Legislature may classify personal property in such manner as it sees fit, and may exempt any of such classes, or may exempt all personal property from taxation" specifically confers broad authority on the Legislature to classify and exempt personal property from taxation.

Similarly, *Roby v Herr*, 194 Ky 622, 240 SW 49, 51 (1922) involved an interpretation of a will, which provided that the property at issue was, "To be held and owned by my said wife . . . and to be disposed of as she may see fit." The Kentucky Court of Appeals held that:

> In arriving at the meaning of the language "To be held and owned by my said wife Eleanor H. Herr, so long as she remains my widow, and to be disposed of as she may see fit," it is not necessary that it be considered with the view to determining whether they were intended to give to the wife the fee-simple title to the estate devised as these words are usually understood and applied. It will be sufficient if the terms employed in the devise, though withholding from the wife the fee-simple title, give her such power of disposition as will enable her to convey the fee; and, fairly construed, the words "to be disposed of as she may see fit," contained in the will of her husband, are broad enough in meaning to confer upon appellee the power of disposition that will enable her to convey to another the fee-simple title to the real estate devised her by the will, though by its terms her marriage before disposing of it would have deprived her of such power. . . .***To***

> ***say that appellee was not given, by the words "to be disposed of as she may see fit" the power to sell and convey the appellant the fee-simple title to the real estate described in the deed tendered him would not only restrict the natural and universally accepted meaning of those words***, but also defeat, in large part, the intention of the testator. (emphasis added).

In re Glant's Estate, 57 Wash 2d 309, 315, 356 P2d 707, 711 (1960) is of similar import. That case involved the interpretation of a statute relating to the division of partnership assets upon death of a partner, which provided that:

> The surviving partner or the surviving partners jointly, shall have the right at any time to petition the court to purchase the interests of a deceased partner in the partnership. Upon such petition being presented the court shall, in such manner as it sees fit, learn and by order fix the value of the interest of the deceased over and above all partnership debts and obligations, and the terms and conditions upon which the surviving partner or partners may purchase, and thereafter the surviving partner or partners shall have the preference right for such length of time as the court may fix, to purchase the interest of the deceased partner at the price and upon the terms and conditions fixed by the court. * * *

In construing this language, the Washington Supreme Court held:

> The statute has two purposes: (1) It *grants a preference right* to the surviving partner to purchase the deceased partner's interest, and (2) it ***places a duty upon the court 'in such manner as it sees fit, [to] learn and by order fix the value of the interest of the deceased,' and establish the terms of the sale***. Implicit in the second purpose is the necessity for the court to incur expense in performing its statutory duty of fixing the value of the interest to be sold. The statute is silent as to who should bear the expense. The application of equitable principles requires that the person who sets in motion the statutory machinery by which he is to be primarily benefited should bear the reasonable expense that is entailed in administering such a statute, in order that the benefit may be realized. ***The trial court, by the terms of the statute, selects the manner in which the valuations will be determined***. (emphasis added).

In *Sacramento Mun Util Dist v Spink*, 145 Cal App 2d 568, 579, 303 P2d 46, 55 (1956), the California Court of Appeals was called upon to interpret a section of the California Public Utility Code, which provided that, "The board may provide by resolution, under such terms and conditions as it sees fit, for the payment of demands against the district without prior specific approval." Cal Pub Util Code § 11891. The Court held that, under the language of the statute,

"[t]here can be no doubt that the District has the power to pay any taxes levied upon property acquired by it in El Dorado County."

Clearly, by providing in PA 152 that a public employer may allocate its employees' share of health insurance premium costs "as it sees fit," the Michigan Legislature certainly did not intend that it was mandatory that these public employers bargain this issue with the labor organizations representing its employees.

The third reason that the employee cost allocation addressed in PA 152 is not a mandatory subject of bargaining is that even a cursory review of the Court of Appeals Opinion in this case reveals that the Court did not simply misinterpret the phrase "as it sees fit," but rather, ignored that language altogether. (**JA 490a-491a**). This the Court may not do.

In *Koontz v Ameritech Services, Inc,* 466 Mich 304, 312, 645 NW2d 34 (2002), this Court succinctly held, "Courts must give effect to every word, phrase, and clause in a statute, and must avoid an interpretation that would render any part of the statute surplusage or nugatory." See also *City of Coldwater v Consumers Energy Co*, -- Mich --, -- NW2d --, 2017 WL 2218196, at *5 (May 18, 2017).

Similarly, in *Pohutski v City of Allen Park*, 465 Mich 675, 683-684, 641 NW2d 219, 226 (2002), this Court stated that:

> When parsing a statute, we presume every word is used for a purpose. As far as possible, we give effect to every clause and sentence. The Court may not assume that the Legislature inadvertently made use of one word or phrase instead of another. Similarly, we should take care to avoid a construction that renders any part of the statute surplusage or nugatory. (internal citations omitted).

The Court of Appeals' decision is this case is totally and completely devoid of any analysis whatsoever as to what that Court thought the phrase "as it sees fit" means if it does not

carry the plain meaning that a public employer may allocate its employees' share of health insurance premium costs without bargaining. (**JA 490a-491a**).

Fourth, the Court of Appeals decision is completely unworkable, and clearly demonstrates that this issue cannot be a mandatory subject of bargaining because it is not amenable to the collective bargaining process. MERC has held in other refusal to bargain cases that for a matter to be characterized as a "mandatory subject of bargaining," it must be amenable to the collective bargaining process. *Seventeenth District Court (Redford Twp)*, 19 MPER 88 (2006); *City of Grand Rapids*, 22 MPER 70 (2009); *Lakeview Community Schools*, 25 MPER 37 (2011); and *Benton Harbor Area Schools*, 2 MPER ¶ 20108 (1989); *City of Detroit (Water and Sewerage Dept)*, 30 MPER 28 (2016).

A simple example suffices in demonstrating how the decision regarding the allocation of employee health insurance premium costs is not amenable to collective bargaining. Assume a city has a total of three (3) bargaining units that represent employees in three (3) separate departments - Police, Fire, and Department of Public Works (DPW). Exercising its right under *Decatur Schools, supra*, the city elects the 80/20 option, and it wants each employee to pay 20% of the cost. The union representing the police officers disagrees. It wants their members to only pay 10% of the costs. The parties are unable to resolve this issue, and the matter proceeds to Act 312 Arbitration.[3] The Act 312 Panel agrees with the union, and the new collective bargaining agreement provides for only a 10% contribution from the city's police officers. The city now

[3] Michigan Public Act 312 of 1969, MCL 423.231, *et seq.*, provides a process by which a panel of arbitrators are given the authority to literally write those provisions of police and fire collective bargaining agreements upon which the parties cannot agree. An Act 312 Panel only has jurisdiction over mandatory subjects of bargaining. *Metropolitan Council, No 23, AFSCME v City of Centerline,* 414 Mich 642, 327 NW2d 822, 827 (1982). Thus, if the decision of the Court of Appeals in this case stands, an Act 312 Arbitration Panel would have jurisdiction to determine a public employer's allocation of employee costs for health insurance premiums for bargaining units eligible for Act 312 Arbitration.

proceeds to negotiations with the bargaining unit in the Fire Department (which is also eligible for Act 312). The union representing the firefighters takes the same position as was assumed by the police officers' union, proceeds to Act 312 Arbitration, and achieves the same result. At this point (with its police officers and firefighters each paying only 10% of the employee costs), since PA 152 mandates that the Employer pay no more than 80% of the total costs, the remaining unit (in the DPW) must pay the balance of the employee share of those costs, an amount that will have been fixed and determined as a result of the Act 312 decisions. If it does not, the Employer is in violation of PA 152. Yet, with the DPW employees' contribution now "set in stone" by operation of PA 152, the Court of Appeals Decision in this case obligates the city to bargain the issue with the union that represents those DPW employees. How exactly is the city supposed to discharge this bargaining obligation when the language of PA 152 has already mandated the amount of the contribution required from the employees in the DPW union to insure that the city is compliance with PA 152?

This same dilemma also presents itself at the expiration of a collective bargaining agreement. Not every collective bargaining agreement expires at the same time. Suppose, in the example above, the city and each of unions have contractually agreed to a 20% employee contribution. However, the contract with the police union expires one (1) year before the other two (2) contracts expire. Now, suppose that the police union takes the position that it wants that contribution reduced to 10%, and an Act 312 Arbitration Panel agrees. The city still has two (2) existing contracts in place that it cannot breach, each of which calls for a 20% contribution from the employees. Due to the bargaining obligation to the police union, this scenario leaves the city short on its statutorily required employee contributions, and subject to the penalties of Section 9 of PA 152. MCL 15.569.

Clearly, the allocation of employees' costs under PA 152 is not "amenable to the collective bargaining process," and on this basis alone, the Court of Appeals committed reversible error in holding that this issue constitutes a mandatory subject of bargaining.

The fifth reason that the Court of Appeals committed reversible error in this case is, rather than being amenable to collective bargaining, this issue is at the "at the core of entrepreneurial control," and as such, cannot represent a mandatory subject of bargaining. Michigan Appellate Court decisions support this conclusion. In *Bay City Education Association v Bay City Public Schools*, 430 Mich 370, 422 NW2d 504 (1988), this Court examined MCL 380.1751, which provided:

> The board of a local school district shall provide special education programs and services . . . in either of the following ways or a combination thereof:
>
> "(a) Operate the special education program or service.
>
> "(b) Contract with its intermediate school board, another intermediate school board, another local school district board, an adjacent school district board in a bordering state, the Michigan school for the blind, the Michigan school or the deaf, the department of mental health, the department of social services, or any combination thereof, for delivery of the special education programs or services, or with an agency approved by the state board for delivery of an ancillary professional special education service.

The school board exercised its statutory authority to transfer the responsibility for the delivery of special education services to the intermediate school district. In finding that this decision was not a mandatory subject of bargaining, this Court held:

> [w]e hold that the board's decision to terminate its operation of the special education center programs was an educational policy decision within its managerial discretion and was not a "term and condition of employment" subject to the duty to bargain under § 15 of the PERA. To hold otherwise, would unduly restrict local school boards from making decisions that are specifically authorized by the Legislature . . .

Id., 422 NW2d at 510 (emphasis added). It is worthy of note that this Court came to this conclusion even though the statute at issue (Section 1751 of the Michigan School Code) did not amend PERA.

The same decision was recently reached by MERC in *Port Huron Area School District*, 28 MPER ¶ 45 (2014), ("Respondent's decision to contract with RESA to provide psychological evaluations and testing for special education students was an educational policy decision as provided for by MCL § 380.1751 and not subject to a duty to bargain. To hold to the contrary, would unreasonably restrict Respondent from making decisions that it is specifically authorized by the Legislature to make.")[4] That decision was affirmed by the Court of Appeals. *Port Huron Educ Ass'n v Port Huron Area Sch Dist*, No. 325055, 2016 WL 626213, at *2-3 (Mich Ct App Feb 16, 2016).

In *Dearborn Federation of Teachers, Local 681 v Dearborn Board of Education*, 172 Mich App 270, 431 NW2d 253 (1988), Section 51(5) of the State School Aid Act provided as follows:

> Special education personnel transferred from 1 district to another to implement the school code of 1976 shall be entitled to the rights, benefits, and tenure to which the person would otherwise be entitled had that person been employed by the receiving district originally.

In considering this statutory provision, the Court held:

> We further conclude that the § 51(5) provision for retention of employee rights, benefits, and tenure in the event of an interdistrict transfer is not subject to defendant's duty to engage in collective bargaining pursuant to the public employment relations act. See M.C.L. § 423.215; M.S.A. § 17.455(15). The specific mandate of § 51(5), contemplating a narrowly defined problem, must control over the more general provisions of the PERA. See *Wayne County Prosecutor v Wayne Circuit Judge*, 154 Mich App 216, 221, 397 NW2d 274 (1986).

[4] The Michigan Court of Appeals affirmed this Decision on February 16, 2016 in an unpublished Opinion (Case No. 325022).

Id., 431 NW2d at 255 (emphasis added). Once again, the Court had no problem in coming to this conclusion even though the statute at issue (Section 51(5) of the State School Aid Act) did not amend PERA.[5]

Again, in the present case, the Legislature left the allocation of employee costs under PA 152 to be allocated as the public employer "sees fit." As in the cases cited above, it is difficult to conceive of statutory language that could have more clearly left this matter to the discretion of public employers, free from any mandatory bargaining obligation.

Finally, while the *Amici Curiae* is cognizant of a line of Michigan Appellate Court authority that PERA is the dominant law regarding labor relations, and therefore, supersedes other state statutes, that authority has been called into question when dealing with statutes that (like PA 152) were enacted after PERA. In *Kalamazoo Police Supervisor's Ass'n v City of Kalamazoo*, 130 Mich App 513, 525; 343 N.W.2d 601, 607 (1983), the Michigan Court of Appeals held:

> The basis for the Court's holding in *City of Warren*, as well as in other decisions involving the dominance of PERA, was that the Legislature, in enacting the conflicting statute prior to the enactment of PERA, did not have in its mind the concept of public employee collective bargaining.

Similarly, in *Irons v 61st Judicial Dist Court Employees Chapter of Local No 1645*, 139 Mich App 313, 321, 362 NW2d 262, 266 (1984), a district judge declined to appoint an incumbent as a court recorder, appointing another candidate of her own choosing instead. Under the Revised Judicature Act of 1960, MCL §§ 600.101 *et seq*., district court judges have the statutory right to appoint court recorders of their own choosing: "each judge of the district court

[5] Numerous other cases could be cited for the proposition that a statute addressing a specific matter (such as PA 152) prevails over a more general statute that addresses that same matter (such as PERA). See, for example, *Bates v Gates Rubber Co*, 171 Mich App 588, 431 NW2d 81(1988); OAG 1967-68, No. 4583, p. 301.

shall appoint his or her own recorder or reporter." MCL § 600.8602. The Court held that this prevailed over PERA because, among other reasons, it was enacted later in time:

> In this case, we conclude that application of the rules of statutory construction supports a finding that the Legislature intended MCL § 600.8602; MSA § 27A.8602 to prevail over PERA to the limited extent at issue in this case. PERA, MCL § 423.201 *et seq.;* MSA § 17.455(1) *et seq.,* which establishes the right of public employees, with some exceptions, to form labor unions and bargain collectively with their employers as to the term and conditions of employment, was passed in 1965. Three years later, the Legislature established the district court system, including in the system the provisions at issue here. In general, where two statutes which encompass the same subject matter conflict, the later enacted statute controls. *People v Flynn,* 330 Mich 130, 141, 47 NW2d 47 (1951).

See, also, *Dearborn Federation of Teachers*, *supra.*

Thus, any argument that a bargaining obligation under PERA prevails over the provisions of PA 152 (which was enacted decades after PERA) has no merit.

The purpose of PA 152 was to compel public employers in Michigan to address the sharing of the ever-increasing costs of employer-provided health insurance with its employees. As is apparent from the Township's Brief on Appeal and from the foregoing analysis, the obligations of public employers in Michigan to meet the mandates of PA 152 are at least seriously jeopardized, and is some cases rendered impossible, if the decisions of those public employers regarding the allocation of those costs among their employees are constrained by bargaining obligations that the Legislature clearly never sought to impose.

The Court of Appeals December 15, 2015 Opinion should be reversed.

II. BECAUSE THE ALLOCATION OF EMPLOYEE COSTS UNDER PA 152 IS NOT A MANDATORY SUBJECT OF BARGAINING, MERC WAS WITHOUT AUTHORITY TO INTERPRET THAT STATUTE SO AS TO PRECLUDE A PUBLIC EMPLOYER'S USE OF "BUNDLED INSURANCE RATES" IN CALCULATING THOSE EMPLOYEE COSTS.

MERC not only held that the allocation of employee costs under PA 152 is a mandatory subject of bargaining, it also held that the Township was precluded from using "bundled insurance rates" in making those calculations. (**JA 312a-313a**). Generally, a bundled insurance rate includes rates not only for active employees, but also rates for retirees.

However, as demonstrated in the Township's Brief on Appeal and the above analysis, MERC erred by creating a mandatory subject of bargaining in this case, and the Court of Appeals erred in affirming that creation. Once that conclusion is reached, there was nothing for MERC to do but dismiss the Union's unfair labor practice charge. As the MERC Administrative Law Judge recognized at page 18 of her Decision and Recommended Order in this case, "The Commission is not charged with administering Act 152." (**JA 188a**).

Thus, the issue in this case as it relates to the use of bundled insurance rates has nothing to do with the language of Section 2(e) of PA 152, MCL 15.562(e), but rather addresses whether MERC has jurisdiction to enforce statutes beyond PERA. MERC itself has repeatedly and correctly found that it does not possess such jurisdiction. See, for example, *Health Source Saginaw*, 1999 MERC Lab Op 379; *Wayne County Department of Public Health, Environmental Health Division*, 1998 MERC Lab Op 590. Consequently, once it is properly determined that no bargaining obligation under PERA exists in the present case, MERC's consideration of this case should have immediately ceased, and the unfair labor charge should have been dismissed.

RELIEF SOUGHT

For these reasons, Amici Curiae, the Michigan Municipal League, requests that this Honorable Court reverse the Court of Appeals December 15, 2015 Opinion and Order in its entirety. Amici Curiae further request that this Court reverse the Portions of MERC's August 18, 2014 Decision and Order that found that the Township's actions were not permissible under Act 152 and in violation of PERA.

Respectfully submitted,

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Dated: June 14, 2017

STATE OF MICHIGAN
IN THE SUPREME COURT

In the Matter of:

SHELBY TOWNSHIP,

Respondent/Appellant,

-and-

COMMAND OFFICERS ASSOCIATION OF MICHIGAN,

Charging Party/Appellee.

MSC Case No. 153074
COA Case No. 323491
MERC Case No. C12 D-067

CERTIFICATE OF SERVICE

I hereby certify that on June 14, 2017, I caused to be electronically filed the foregoing paper, ***Amicus Curiae Brief of the Michigan Municipal League***, and this Certificate of Service with the Clerk of the Court using the TrueFiling Court ECF system which will send notification to all counsel of record.

By: /s/ Gary P. King
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